INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Denying the Writ	7
Conclusion	14
Appendix A	15

Citations.

Cases: PAGE

Boeing Airplane Co. v. National Labor Relations Board, 140 F. 2d 423 (C.C.A. 10th, 1944) 10

H. J. Heinz Company v. National Labor Relations Board, 311 U.S. 514 (1941) 12

International Association of Machinists v. National Labor Relations Board, 311 U.S. 72 (1940) 12

Joy Silk Mills, Inc. v. National Labor Relations Board, 185 F. 2d 732 (C.A.D.C., 1950), cert. den. 341 U.S. 914 9

National Labor Relations Board v. Brown Co., 160 F. 2d 449 (C.C.A. 1st, 1947) 13

National Labor Relations Board v. Clark Bros. Co., Inc., 163 F. 2d 373 (C.C.A. 2nd, 1947) 9

National Labor Relations Board v. Collins & Aikman Corp., 146 F. 2d 454 (C.C.A. 4th, 1944) 9

National Labor Relations Board v. Donnelly Garment Co., 330 U.S. 219 (1947) 11

National Labor Relations Board v. Link-Belt Company, 311 U.S. 584 (1941) 12

National Labor Relations Board v. Mathieson Alkali Works, Inc., 114 F. 2d 796 (C.C.A. 4th, 1940) 10

National Labor Relations Board v. Norfolk Southern Bus Corp., 159 F. 2d 516 (C.C.A. 4th, 1946), cert. den. 330 U.S. 844 10

National Labor Relations Board v. Pittsburgh Steamship Company, 340 U.S. 498 (1951) 11, 12

National Labor Relations Board v. Stowe Spinning Co., 336 U.S. 226 (1949) 11

National Labor Relations Board v. Tennessee Coach Co., 191 F. 2d 546 (C.A. 6th, 1951) 14

National Labor Relations Board v. Virginia Electric & Power Co., 314 U.S. 469 (1941) 11

PAGE

National Labor Relations Board v. West Ohio Gas Co., 172 F. 2d 685 (C.A. 6th, 1949) 10

Ohio Associated Tel. Co. v. National Labor Relations Board, 192 F. 2d 664 (C.A. 6th, 1951) 10

Quaker State Oil Refining Corporation v. National Labor Relations Board, 119 F. 2d 631 (C.C.A. 3rd, 1941) 10

Republic Aviation Corporation. v. National Labor Relations Board, 324 U.S. 793 (1945) 11

Sax v. National Labor Relations Board, 171 F. 2d 769 (C.A. 7th, 1948) 8

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) 3, 7, 11, 12, 14

NATIONAL LABOR RELATIONS BOARD DECISIONS:

Boston and Lockport Block Company, 98 NLRB No. 114 (1952) 9

Standard-Coosa-Thatcher Company, 85 NLRB 1358 (1949) 9

West Texas Utilities Company, Inc., 85 NLRB 1396 (1949) 9

UNITED STATES STATUTES:

Administrative Procedure Act, as amended (60 Stat. 237, 5 U.S.C., § 1001 *et seq.*):

Sec. 1006 15

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, § 141 *et seq.*):

Sec. 8 (a) (1) 7

Sec. 10 (c) 15

Sec. 10 (e) 8

MISCELLANEOUS:

H. R. Rep. No. 510, 80th Cong. 1st Sess. (1947) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 791

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ARTHUR WINER, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW.

The opinion of the Court of Appeals (R.A. 36-44)[1] is reported at 194 F. 2d 370. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B.A. 15-33, 42-48) are reported at 94 NLRB 651.

[1] The printed record before this Court consists of two separately paginated volumes: the Appendix to the Board's brief in the court below, herein designated "B.A.", and the Appendix to Respondent's brief in the court below, herein designated "R.A." Reference to the petition for enforcement, the opinion of the Court of Appeals in full and judgment denying enforcement of the Board's order are bound with, and immediately follow, said Appendix to Respondent's brief, and are paginated continuously therefrom. Respondent's Appendix, as referred to herein, includes said reference to said petition, opinion and judgment.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 26, 1952 (R.A. 46). The jurisdiction of this Court is invoked under the Act of June 25, 1948, 62 Stat. 928, 28 U.S.C. § 1254 (1), and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED.

Petitioner has predicated its "Questions Presented" upon a factual statement (Petition 2), unsupported by reference to the record, which does not accurately reflect the evidence adduced. Respondent discusses this statement *infra* at pages 3-6.

The questions presented are:

1. Whether the Board could properly hold that alleged[2] acts of interrogation and surveillance constituted interference, restraint, or coercion in violation of the right of employees "to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

2. Whether the Board could properly attribute the acts of the supervisor, who was in charge of the employees in question, to the corporate employer.[3]

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[2] Except for substitution of "alleged" for "these", Respondent believes it unnecessary to take issue with the precise wording of Petitioner's "Questions Presented" (Petition 3).

[3] With regard to Petition 3, footnote 2, the discharge of Helen Little presents only the routine inquiry as to whether substantial evidence supported Petitioner's finding of discrimination. The Court of Appeals found no such support, expressly holding (R.A.

STATUTES INVOLVED.

Petitioner has reprinted (Petition 28-31) certain provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. IV § 141 *et seq.*). Additional provisions of that Act and pertinent provisions of the Administrative Procedure Act, as amended (60 Stat. 237, 5 U.S.C. § 1001 *et seq.*), are set forth in Appendix A to this Brief, *infra*, page 15.

STATEMENT.

The Court of Appeals described the background of the case at bar as follows (R.A. 39):

> "In the instant case . . . a small plant with less than one hundred employees is involved. The trial examiner found that during the period in question 'union discussions among the employees became quite prevalent in the plant.' It is also apparent that the employees talked freely before and with the supervisor, Winkler, and with the company president, Winer."

As he had done "over a period of years" (R.A. 2; see also R.A. 3), Respondent's president called three employees to his office on a day during the latter part of July

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44) that "Little did have a great deal of trouble with the machine she was using in her work; that her troubles with the machine caused machine failures which entailed costly repairs; and that the other employees did not have similar troubles with their machines. Moreover, Little herself told her friends that she was discharged because of machine trouble, and told the Indiana compensation authorities that she was laid off because of lack of work."

The quality of the reasoning upon which Petitioner relied to sustain its discrimination finding is sufficiently indicated in the opinion of the court below at R.A. 43.

"Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals." *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 491 (1951).

the first part of August, 1949. Eva Van Meter, one of these employees, testified that "since we had moved out to the new building something was wrong, our work wasn't coming out as fast as it used to be. I know I fell way down" (R.A. 76). "Well, there wasn't any of us doing as much as we had been in the other place. I knew something was wrong. If the rest of the girls failed, I knew it wasn't me. So, we discussed that, and he had the machine moved so there would be work closer to each one of the top pressers" (R.A. 14). Winer stated: "'If I understand it, you are trying to organize a union. If that is what the girls want, that is what they can have'" (R.A. 13; see also R.A. 14, 15).

The court below found (R.A. 37):

> "There was no testimony indicating that Winer asked any of the girls he interviewed whether or not they or any other employees belonged to the union or had engaged in any union activities. Van Meter testified positively that Winer did not ask her such questions. The third girl did not remember his asking anything about dissatisfaction or any similar matter."

Respondent's sewing room supervisor, Winkler, had been employed in that capacity for three years before the hearing, and had previously been a sewing machine operator for Respondent (R.A. 17). She had sewed as an operator with some of the girls whom she supervised at the time of the hearing (R.A. 17), and she and the girls in her department on occasion discussed "Just anything that happens to come up", including church, fishing, sewing, cooking (R.A. 18)—and these discussions started either by Winkler's approaching the girls or by their approaching her (R.A. 18).

Although Winkler never approached employee Anne Kusmierz on the subject of union activity (B.A. 97), Kusmierz used to approach Winkler and Assistant Supervisor

Kovacick at the lunch hour and start discussions about the union (B.A. 98, 101, 102). Thus she asked Winkler whether she (Kusmierz) "should bring in a leaflet" (B.A. 98). Kusmierz admitted that in August, 1949, she came up to Winkler and "told her I heard from a few girls that the union lady was going around, and I said, 'I know she wasn't by my house.' I said, 'Maybe she will be there. I don't know'" (B.A. 70). The Board's counsel asked Kusmierz, "Did you offer that yourself?" Her answer was, "Yes, I did" (B.A. 70). Kusmierz conceded that on the day of the union meeting she took her notice of the meeting to Winkler (B.A. 71):

> "A. . . . at lunch hour, *I went up to Anne's desk.*
>
> "Q. Anne whom?
>
> "A. Anne Winkler. *I showed her my letter.* She looked at it and then gave it back to me. Nothing was said after that. *I asked her,* 'Well, I don't know what to do, if I should go to the meeting or shouldn't go.' *I told her* that I didn't know what to do.
>
> "She said, 'Well, you are your own boss. It is up to you. If you want to, you can go and find out what it is all about.'" (Emphasis added.)

And Winkler explained to Kusmierz: ". . . you want to hear their side of it just as well as—I know I would" (R.A. 18).[4] The Court of Appeals held (R.A. 40): "So far as the record shows, Winkler was motivated only by her own curiosity on the subject of the union, a subject in which all were interested and about which all of the employees were talking."

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[4] Petitioner states (Petition 5): ". . . Winkler, . . . in Winer's absence, reported the information she obtained to Winer's administrative assistant." B.A. 59, 96, 97, 107-111 and R.A. 17-18 are cited in support of that statement. Of this list of references, only one—B.A. 96—is relevant. This contains the assistant's testimony that Winkler "told me that some of the girls had *come to her* and *told her* that they had received letters to attend a meeting, or something to that effect." (Emphasis added.)

In addition, the court below specifically ruled:

(a) that the Board had *not* found that "there was any statement derogatory of the union made by the Respondent or by anyone speaking for it" (R.A. 38);

(b) that the Board had *not* found that Respondent "made any threats against employees in reference to union membership or activity" (R.A. 38-39); and

(c) that the Board had *not* found that Respondent "promised any benefits except as to vacations and as to that finding . . . there was no reasonable basis for it in the evidence" (R.A. 39).

REASONS FOR DENYING THE WRIT.

I.

Drawing upon its own "presumption" and "expertise", Petitioner obscures the pettiness of the facts into which the court below refused to read a violation of the Act. That refusal to "presume" a violation is another in the long line of decisions disapproving Petitioner's doctrinaire determinations in the face of a statute commanding decision upon the evidence. It is more than that. It is a decision meticulously faithful to the standards of review laid down by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488, 490 (1951).

The central fact in the case at bar is that for more than four years before the occurrences in issue, a union had attempted to organize Respondent's employees, and yet Petitioner alleged only the brief and cryptic Winer and Winkler incidents to sustain its finding that Section 8(a)(1) of the Act had been violated. Such violation must be found, Petitioner told the court below, despite the fact that Respondent made no derogatory statements about the union, despite the fact that Respondent made no threats or promises, despite Winer's assurances that if the girls wanted a union that was what they could have, and despite Winkler's statements that the girls were "their own boss" and should hear the union side of it. Citing only cases involving long and persistent anti-union campaigns, Petitioner failed to convince the court below that this case involved any violation—failed to convince the court below that on the entire record the court could conscientiously sustain the Board.

Petitioner's main proposition appears to be that this Court ought to grant certiorari to prevent a tendency of courts to "substitute for the Board's *presumption* . . . that interrogation and surveillance in all cases tend to jeopardize the security of employees in exercising their statutory rights, their [the courts'] own *judgment* that unless shown in each case to proceed from evil intent, acts of interrogation and surveillance are innocuous" (Petition 14; emphasis added).

In considering the 1947 amendments to the National Labor Relations Act, the House conferees, in agreeing to the present language of Section 10(e) requiring proof "by substantial evidence on the record considered as a whole," reported to the House[5]:

> "The language [of Section 10 (e)] . . . *precludes the substitution of expertness for evidence* in making decisions. It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to *preclude such decisions as those in . . . the . . . Republic Aviation . . . case. . . .*" (Emphasis added.)

The same report also stated[6]:

> "The conference agreement provides that the Board shall act only on the 'preponderance' of the testimony —that is to say, on the weight of the credible evidence. Making the 'preponderance' test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the 'preponderance' test merely by the drawing of 'expert' inferences therefrom, where it would not meet that test otherwise."

It is significant that Petitioner, in its argument in the court below, did not rely on presumption or expertise. Its argument there against the application of *Sax* v. *National*

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[5] H. R. Rep. No. 510, 80th Cong. 1st Sess. 56 (1947).
[6] Ibid., p. 54.

Labor Relations Board, 171 F. 2d 769 (C.A. 7th, 1948) was not that presumption should be substituted for evidence, but that in the instant case the *evidence* established a course of conduct on the part of Respondent which was intended to thwart or destroy union activities.

Indeed, Petitioner, even in its own decisions, has not stood four-square behind its principle that interrogation is unlawful *per se*. On the same day the Board decided *Standard-Coosa-Thatcher Company*, 85 NLRB 1358 (1949) (reprinted, in part, at Petition 18-31, as Petitioner's confession of faith on the subject), the Board also decided *West Texas Utilities Company, Inc.*, 85 NLRB 1396 (1949). In the latter case, it reversed the Trial Examiner's finding of a violation of Section 8(a) (1) on the very ground that there was only "isolated" interrogation! In *Boston and Lockport Block Company*, 98 NLRB No. 114 (1952), the Board again held that isolated interrogation did not call for a finding that Section 8(a) (1) had been violated.

Petitioner cites (Petition 13) *National Labor Relations Board* v. *Collins & Aikman Corp.*, 146 F. 2d 454, 455 (C.C.A. 4th, 1944) as holding that "any real surveillance by the employer over the Union activities of employees" violates the Act. But the facts in *Collins & Aikman* show surveillance "for several hours," "almost nightly", over a three-week period, at a drug store where unionizing activity took place—and which was frequented by the employer's agents only during the unionizing period. Such facts are hardly comparable to the incidents in issue here, without either history or pattern of anti-union activity, and without threat, promise or disparagement, real or implied.

In *National Labor Relations Board* v. *Clark Bros. Co., Inc.*, 163 F. 2d 373, 376 (C.C.A. 2nd, 1947) (Petition 13), the court found "an aggressive anti-union campaign."

Petitioner's quotation (Petition 13) from *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 743

(C.A.D.C., 1950), cert. den. 341 U.S. 914, similarly relied on by Petitioner, deals only with a narrow approval of limited questioning by employers' counsel in defending against unfair labor practice complaints.

It should be particularly noted that Petitioner's abbreviated quotation (Petition 13) from *National Labor Relations Board* v. *Norfolk Southern Bus Corp.*, 159 F. 2d 516, 518 (C.C.A. 4th, 1946), cert. den. 330 U.S. 844, is as follows:

> "... it [interrogation of employees concerning their union activities ... of itself] has 'been uniformly condemned as violation of the Act....'"

But what the court actually said was:

> "Questioning of employees concerning union membership and activities *and disparaging remarks* by supervisory employees *made in such way as to hamper the exercise of free choice on the part of the employees*, have been uniformly condemned as violation of the Act." (Emphasis added.)

Far from accepting Petitioner's view that talk on union matters is to be considered in a vacuum, the courts have refused to accept Petitioner's double standard that where anti-union background can be proved, it is decisive in finding a violation of Section 8 (a) (1) of the Act, and where anti-union background cannot be proved, presumption is enough. Representative cases are: *National Labor Relations Board* v. *Mathieson Alkali Works, Inc.*, 114 F. 2d 796, 799, 802 (C.C.A. 4th, 1940); *Quaker State Oil Refining Corporation* v. *National Labor Relations Board*, 119 F. 2d 631, 632, 633 (C.C.A. 3rd, 1941); *Boeing Airplane Co.* v. *National Labor Relations Board*, 140 F. 2d 423, 434-35 (C.C.A. 10th, 1944); *National Labor Relations Board* v. *West Ohio Gas Co.*, 172 F. 2d 685, 687-88 (C.A. 6th, 1949); *Ohio Associated Tel. Co.* v. *National Labor Relations Board*, 192 F. 2d 664, 668 (C.A. 6th, 1951).

Petitioner relies (Petition 15) on *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949) and *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 (1945), and refers to *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219 (1947) for the proposition that this Court sanctions administration of the Act by presumption. But in the *Stowe Spinning Co.* case, what this Court actually said was:

> "*In the background of discrimination* found by the Board in this case, we cannot say that its conclusion should be upset." (336 U.S., at 230; emphasis added.)
>
> "We cannot say that the Board was wrong as a matter of law *in view of the setting.*" (336 U.S., at 231-32; emphasis added.)

In the *Donnelly Garment Co.* case, neither the pages cited by Petitioner (231-32) nor any other part of the opinion deal, even by indirection, with the Board's presumptions.

As for the *Republic Aviation* case, it was expressly dealt with in H. R. Rep. No. 510, 80th Cong. 1st Sess. 56 (1947), quoted, in part, *supra*, page 8, and quoted and discussed by this Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 485-86 (1951).

As this Court made clear in *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469 (1941), employer expressions on union matters must be viewed in their full setting. And whatever doubts may have remained were effectively laid to rest by this Court's pronouncements in the *Universal Camera* and *Pittsburgh Steamship* cases. It is now beyond cavil that "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including

the body of evidence opposed to the Board's view." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488 (1951). Where, as here, the decision of the court below depends upon appreciation of the total circumstances, there is no warrant for Petitioner's urging this Court to depart from its usual rule of non-interference with decisions of the Courts of Appeals. *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* 340 U.S. 498, 503 (1951).

II.

Petitioner also questions (Petition 3) "whether the Board could properly attribute the acts of the supervisor, who was in charge of the employees in question, to the corporate employer."

In *International Association of Machinists* v. *National Labor Relations Board,* 311 U.S. 72, 80 (1940) (Petition 16), this Court made it clear that the issue of employer responsibility for supervisors' acts depended on whether the employees would have just cause, under the circumstances, to believe that the supervisors were acting for management.

In *H. J. Heinz Company* v. *National Labor Relations Board,* 311 U.S. 514, 518, 521 (1941) (Petition 16), not only did the employer admit that at least four foremen and its general superintendent actively disparaged the union and threatened the employees with discharge, but the employer took no step to disavow any of these activities or proclaim its neutrality.

In *National Labor Relations Board* v. *Link-Belt Company,* 311 U.S. 584, 599 (1941) (Petition 16), this Court

not only stressed the employer's failure to announce its impartiality, but stated:

> "If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere."

The routine and repeated decisions of the courts answering Petitioner's second question in the negative, under circumstances such as the present, are adequately reflected in these two excerpts:

> ". . . it seems to us pertinent to note that there has come to our attention no case involving acts of supervisory officials in which a court has enforced or affirmed a cease and desist order of the Board except cases in which there was either a record of hostility toward the outside union, or else evidence of discriminatory discharges or of active solicitation by supervisors, or some other pointed indication of the employer's anti-union sentiment." *National Labor Relations Board* v. *Brown Co.*, 160 F. 2d 449, 456 (C.C.A. 1st, 1947).

> "Whether acts of supervisory employees constitute restraints upon union activity on the part of a company must be viewed, to a large extent, against the background of the company's attitude, policy, and practice in the past with regard to such matters. . . . Before inquiries as to union membership and statements by employers or supervisory employees can be held to be unfair labor practices, they must be shown to have some relation to the coercion or restraint of the employees in their right of self organization. . . . The undisputed testimony of all witnesses, both for the Board and for the respondent, shows that neither the supervisory employees nor the respondent expressed any views that contained threats of reprisal or force or promise of benefits which would have tended to restrain, coerce, or intimidate the employees in the exercise of their right to organize and bargain col-

lectively. . . ." *National Labor Relations Board* v. *Tennessee Coach Co.*, 191 F. 2d 546, 554, 555-56 (C.A. 6th, 1951).

CONCLUSION.

The instant proceeding is another attempt by Petitioner to mark out for itself a restricted area in the administration of the National Labor Relations Act—off limits to any reviewing court.

This Court rejected the same attempt in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951). The case at bar neither requires nor warrants a reiteration of the principles stated in that case.

We accordingly request that the Petition be denied.

Respectfully submitted,

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June, 1952.

APPENDIX A

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. IV, § 141 *et seq.*), in addition to those quoted by Petitioner at pages 28-31 of its Petition, are as follows:

> Sec. 10(c): ". . . If *upon the preponderance of the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ." (Emphasis added.)

The Administrative Procedure Act, as amended (60 Stat. 237, 5 U.S.C. § 1001 *et seq.*), provides, in part:

> Sec. 1006: "In hearings which section . . . 1004 of this title requires to be conducted pursuant to this section . . . no sanction shall be imposed or rule or order be issued *except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.*" (Emphasis added.)